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No. 99-1908

Supreme Court, U.S.
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In The

Supreme Court of the United States

JAMES ALEXANDER, in his official capacity as the Director of the Alabama Department of Public Safety, and the ALABAMA DEPARTMENT OF PUBLIC SAFETY,

Petitioners,

v.

MARTHA SANDOVAL, individually and on behalf of all others similarly situated,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF CENTER ON RACE, POVERTY AND THE ENVIRONMENT, NLG/MAURICE AND JANE SUGAR LAW CENTER FOR SOCIAL AND ECONOMIC JUSTICE, FLINT GENESEE UNITED FOR ACTION, JUSTICE AND ENVIRONMENTAL SAFETY, RESIDENTS OF SANBORN COURT, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, INSTITUTE FOR PUBLIC REPRESENTATION, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND COMMUNITIES FOR A BETTER ENVIRONMENT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether individuals who have been injured by a federally funded entity's violation of Title VI regulations, issued pursuant to Section 602 of the Civil Rights Act of 1964, may bring a private action against the violator to end the discriminatory behavior.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The National Lawyers' Guild/Maurice and Jane Sugar Law Center for Social and Economic Justice (the Guild Law Center or GLC)[1] is a national public interest law center that focuses on economic and environmental justice issues. The GLC represents *amicus* FGUA in their Title VI administrative claim pending before the Environmental Protection Agency (EPA), and has worked extensively on behalf of low income and minority communities addressing environmental justice issues. The GLC's ability to effectively represent its client groups will be affected by the decision in this case.

Flint-Genesee United for Action, Justice and Environmental Safety (FGUA) is a non-profit community organization formed in opposition to the Genesee Power Station, a wood waste incinerator/electrical generator located in a predominantly African-American community in Flint, Michigan. FGUA participated in filing an administrative complaint under the EPA's Title VI regulations to challenge the permitting process. The complaint was filed in December 1992 and has been under investigation since January 1995.

The Center on Race, Poverty and the Environment (CRPE) is a national environmental justice organization,

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[1] *Amici curiae* file this motion with the consent of all parties. The written consent is on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for any party in this case authored this brief in whole or in part; and, furthermore, that no person or entity, other than *amici* and their counsel, has made a monetary contribution specifically for the preparation or submission of this brief.

which represents low-income communities in environmental disputes. CRPE represents 28 community groups and individuals in six states who have filed Title VI administrative complaints with the EPA, and the Departments of Energy, Housing and Urban Development, the Interior and Transportation. CRPE's ability to represent its clients will be directly affected by this case.

Residents of Sanborn Court (RSC) is an unincorporated community group made up of residents of the Sanborn Court housing development in Salinas, California. RSC's membership is more than 95% Latino and primarily farmworkers. RSC filed a Title VI administrative complaint with the EPA in August 1995, alleging discriminatory impact from the siting of a toxic waste facility one block away. No decision has been reached on that claim.

The Institute for Public Representation (IPR) is a public interest law firm and clinical education program at the Georgetown University Law Center. Attorneys and law students at IPR represent individual and organizational clients in a wide range of civil rights and environmental law cases. IPR attorneys have worked extensively on environmental justice issues, focusing on the problems facing low-income and minority communities in the District of Columbia area. IPR's ability to represent these clients will be directly affected by the decision in this case.

New York Lawyers for the Public Interest (NYLPI) is a non-profit law firm that works in three project areas: access to health care, environmental justice and disability rights. NYLPI directly represents individuals throughout

New York City and New York State and, also, harnesses the resources of more than eighty of New York's law firms and corporate legal department to provide free legal assistance to community organizations and not-for-profits. NYLPI's ability to represent clients in communities across New York on issues of discrimination on the basis of race and ethnicity will be directly affected by the decision in this case.

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national non-profit organization whose mission is to protect and promote the civil rights of the more than 30 million Latinos living in the United States. This litigation raises important issues relevant to the ability of the organization and the petitioners they represent to challenge discrimination through Title VI actions, particularly in the areas of education and public resource equity. MALDEF relies on the regulations promulgated under Title VI as a means to effect justice in lawsuits filed against agencies receiving federal funds.

Communities for a Better Environment ("CBE") is a California-based environmental health and justice organization with members throughout the state. For over twenty years, CBE has used science, law, and organizing to improve the urban environment in California. CBE believes that access to the courts to redress injuries is an important tool for all people, especially for members of minority groups who face disproportionate burdens from discrimination and the effects of environmental degradation.

SUMMARY OF ARGUMENT

A private right of action to enforce the regulations adopted to implement Title VI is entirely consistent with the purpose and history of that civil rights statute. The legislative history of Title VI shows that Congress intended for § 601, which grants individuals protection from discrimination in federally-funded programs, to be read together with § 602, which requires agencies to adopt regulations implementing and effectuating § 601. As a result, the unquestioned private right of action to enforce the statute must extend to the precise types of discrimination identified by agencies in the regulations. Since the passage of Title VI and the implication of a private right of action under § 601, Congress has amended the statute on many occasions and, in doing so, ratified this construction.

Implication of a private right of action to enforce the regulations adopted under Title VI is also consistent with Congress' intent to ensure effective protection of the individual rights created in the statute. Administrative enforcement has experienced serious backlogs and a demonstrated inability to effectively ensure compliance with Title VI regulations. Because administrative enforcement alone has not and cannot reach all prohibited discriminatory behavior, private enforcement is essential to effectuate the statutory goal of ensuring that federal funds do not perpetuate discrimination. Moreover, the availability of a private right of action has not resulted and will not result in the flood of litigation or "parade of horribles" presented by Petitioner and many of the *amici* filing in support of Petitioner. Lower courts, including nine federal circuits, have allowed such actions for over

two decades without overwhelming their dockets or subjecting recipients of federal funds to unlimited liability. Disparate impact claims under Title VI regulations will continue to be appropriately limited by the standards of liability and burdens of proof imposed by courts, as they have been for years.

ARGUMENT

The availability of an implied private right of action under any law hinges ultimately on Congressional intent. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979). Courts have looked to several factors to determine Congressional intent, including: 1) the purpose and structure of the particular law; 2) Congressional explanations of its function; 3) the necessity of a private right of action to fulfill the purposes of the law; and 4) compatibility of such an action with the law. *See id.* at 17-19; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568-70 (1979); *Cort v. Ash*, 422 U.S. 66, 78 (1975). In this case, Congressional intent to create a private right of action expansive enough to enforce Title VI regulations is demonstrated by the Act's purpose, which was to provide a broad individual right to be protected from racial, ethnic and national origin discrimination, and the structure of the Act, which makes private enforcement necessary to achieve this goal.

I. CONGRESS INTENDED TITLE VI TO CREATE A BROAD PERSONAL RIGHT AGAINST DISCRIMINATION EXPANSIVE ENOUGH TO INCLUDE THE PROTECTIONS PROVIDED BY REGULATION.

Although Title VI was enacted both to prevent federal funds from supporting discriminatory programs and to give individuals an effective remedy against discrimination, *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979), the principal motivation was to protect and enforce individual rights, 110 Cong. Rec. 6561 (Sen. Kuchel), 11225 (Sen. Cooper). Given this predominant concern, this Court has already found that there is an implied private right of action directly under § 601 of Title VI, which prohibits discrimination in federally-funded programs. *Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Cannon*, 441 U.S. at 693-94.

Section 601 alone, however, was not intended to provide the full measure of protection available under Title VI. Rather, by also passing § 602 of the Act, Congress directed federal agencies:

> " . . . **to effectuate the provisions of Section 2000d of this title** . . . by issuing rules, regulations, or orders of general applicability . . . "

42 U.S.C. § 2000d-1. (Emphasis added). Congress recognized that federal agencies were more familiar with the ways in which discriminatory behavior and decisions would manifest themselves in specific federally-funded programs and were most capable of crafting regulations designed to end those practices. *See* H. Rep. 914, 88th Cong., 2d Sess. (1964), Additional Views of George Meader, *reprinted in* 1964 USSCAN 2391, 2425; 110 Cong.

Rec. 1613. As a result, federal agencies promulgated the disparate impact regulations, which are the subject of this dispute.[2]

A careful review of the legislative history demonstrates that Congress intended §§ 601 and 602 to operate jointly to create a uniform system of rights and enforcement mechanisms. Congress characterized § 601 as setting the general policy and § 602 as establishing the more precise requirements and methods for implementation. In response to an argument that these sections were inconsistent, proponents of the legislation insisted that the sections must be read together to modify or inform each other and could not be read independently. *See* 110 Cong. Rec. 13378, 14345. Because Congress intended the law and its regulations jointly to define the duties of federal fund recipients and the corresponding individual right against discrimination, the private right of action available under Title VI must allow for judicial enforcement of both the statute and its implementing reguiations.

Indeed, courts have long assumed the availability of a broad private right of action, both in cases brought directly under the regulations and in cases brought to compel agency enforcement of them. In *Women's Equity Action League v. Cavazos*, 906 F.2d 742 (1990), plaintiffs brought suit under the Administrative Procedure Act

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[2] *See, e.g.*, 28 C.F.R. §§ 42.104(b)(2)-(3) (Justice or DOJ); 29 C.F.R. §§ 31.3(b)(2)-(3) (Labor); 32 C.F.R. §§ 195.4(b)(2)-(3) (Defense); 49 C.F.R. §§ 21.5(b)(2)-(3) (Transportation or DOT); 34 C.F.R. §§ 100.3(2)-(3) (Education or DOEd); 45 C.F.R. §§ 80.3(2)-(3) (Health and Human Services or HHS); 40 C.F.R. §§ 7.35(b), (c) (EPA).

against the Department of Education (DOEd) for its failure to enforce fully Title VI. The D.C. Circuit found that the plaintiffs had a private right of action directly against the recipients of federal funding, who were allegedly violating Title VI. *Id.* at 750-51. Relying on *Cannon, supra*, the court found that "Congress considered private suits to end discrimination not merely adequate but in fact the proper means for individuals to enforce Title VI," and, because individuals had an adequate remedy under Title VI, the APA provided no additional relief. *Id. See also Washington Legal Foundation v. Lamar*, 984 F.2d 483, 485-86 (D.C. Cir. 1993). The same analysis has been applied to a recent action that sought to compel the Department of Transportation (DOT) to enforce its Title VI disparate impact regulations. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191-92 (4th Cir. 1999). In dismissing the plaintiffs' claim against DOT, the Fourth Circuit implicitly found that plaintiffs had a direct remedy against the funding recipients for violation of DOT's regulations and that this remedy was "not only 'adequate,' but, as the Supreme Court recognized, is preferable to a direct suit against the agency itself." *Id.* If Title VI regulations are not privately enforceable, victims of discrimination in federally-funded programs will be left without a remedy against either the federal agency that failed to enforce its regulations or the federally-funded entity that violated those regulations unless *Cavazos* and its progeny are revisited by the courts.

Since the passage of Title VI, Congress has consistently demonstrated its intention to allow for private enforcement of the Act as a whole. In 1968, Congress rejected an amendment to Title VI that would have

defined "discrimination" to include only intentional acts and, arguably, invalidated the disparate impact regulations then under consideration. *Guardians Ass'n v. Civil Service Comm'n*, 463 U.S. 582, 620 (1983) (Marshall, J., dissenting). Congress then expanded the availability of private suits by allowing for recovery of attorney's fees, 42 U.S.C. § 1988, and abrogating states' sovereign immunity from suit, 42 U.S.C. § 2000d-7. In 1988, four years after the Court's decision in *Guardians*, Congress amended Title VI to reverse a judicial interpretation narrowing the term "programs" and, despite repeated warnings that this amendment would greatly expand the reach of the private rights of action assumed to be available under Title VI regulations, chose not to preclude a private right of action or to limit the scope of the regulations themselves. *See* 134 Cong. Rec. 99-100 (Sen. Hatch), 4257 (Sen. Hatch), 18879-800 (Rep. Fields) (1988); *Civil Rights Restoration Act of 1985: Joint Hearings on H.R. 700 Before the House Committee on Education & Labor and the Subcommittee on Civil & Constitutional Rights of the House Committee on the Judiciary*, 99th Cong., 1st Sess. 734, 1095, 1099 (1985); *Civil Rights Act of 1984: Hearings on S. 2568 Before the Subcommittee on the Constitution of the Senate Committee on the Judiciary*, 98th Cong., 2d Sess. 23-24, 153-54, 200 (1984).

While the action or inaction of subsequent Congresses is not determinative of the legislative intent behind the original measure, such consistent interpretations over the course of many years are entitled to weight. *See Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 80, 90 (1958). Congressional inaction can be particularly significant where Congress fails to correct a long-

standing and well-known administrative or judicial interpretation of a statute, despite having made substantive changes to other portions of the statute. *Ankenbrandt v. Richards*, 504 U.S. 689, 700-01 (1992); *Guardians*, 463 U.S. at 620-21 (Marshall, J., dissenting); *United States v. Rutherford*, 442 U.S. 544, 554 (1979). *See also Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379-81 (1982). This presumption is especially strong where the interpretation involves a matter of "considerable public controversy," as in the case of civil rights laws. *Guardians*, 463 U.S. at 620-21 (Marshall, J., dissenting). Since Congress was fully aware of the availability of a private right of action during its frequent debates over amendments to the statute, its apparent unwillingness to amend Title VI to preclude a private right of action under the regulations suggests that Congress has ratified both the disparate impact regulations and an individual right to enforce those regulations.

Petitioner and several *amici* argue that, despite the limited question presented in this appeal, this Court should invalidate the disparate impact regulations first promulgated more than 30 years ago, adopted by all federal agencies which distribute federal funds and applicable to all recipients of federal funds. Brief for Petitioners at 25-26; Brief *Amicus Curiae* of Pacific Legal Foundation and Center for Equal Opportunity (PLF Brief) at 5-12; Brief *Amicus Curiae* of Washington Legal Foundation et al. (WLF Brief). Assuming that the Respondent and/or other *amici* discuss more fully the procedural and substantive deficiencies of this argument, we will not address it here. We note, however, the terrible disruption to agency operations and the settled expectations of

recipients of federal funds that would be caused by invalidating these regulations at such a late date.

II. A PRIVATE RIGHT OF ACTION TO ENFORCE THE REGULATIONS IMPLEMENTING TITLE VI IS CONSISTENT WITH AND NECESSARY TO FULFILL THE PURPOSES OF TITLE V.

Petitioners assert that a private right of action to enforce Title VI regulations is unnecessary because of the existing administrative enforcement mechanism. Brief for Petitioners at 16-17. However, vesting exclusive enforcement responsibility in federal agencies was not the intent of the statute and the agencies do not have the capacity to be the sole enforcers of Title VI and its regulations. As the United States Commission on Civil Rights (USCCR) recently found, "Federal Title VI enforcement has been effectively dormant" and "[w]ith few exceptions, the Federal agencies . . . have disregarded Title VI enforcement." USCCR, *Federal Title VI Enforcement to Ensure Nondiscrimination in Federally Assisted Programs* iii (June 1996) (*Federal Title VI Enforcement*).

A. Administrative Enforcement Alone is Insufficient to Ensure Compliance With Title VI Regulations.

Under the model regulations adopted by the Department of Justice (DOJ) and, with limited modifications, by every other federal agency, individuals who believe that a recipient of federal funds has violated Title VI or its regulations can file a complaint with the relevant federal agency. 28 C.F.R. § 42.107(b) (DOJ). *See also* 29 C.F.R.

§ 31.7(b) (Labor); 32 C.F.R. § 195.8(b) (Defense); 34 C.F.R. § 100.7(b) (DOEd); 45 C.F.R. § 80.7(b) (HHS); 40 C.F.R. § 7.120(a) (EPA). The funding agency must then investigate the claim to determine if Title VI or its regulations have been violated before withholding funds or referring the case to the Department of Justice. 42 U.S.C. § 2000d-1. However, without addressing the reasons, possible motives or underlying circumstances, the funding agencies have not been able to investigate properly and resolve all meritorious claims.

1. The agencies' record demonstrates that administrative enforcement alone cannot fulfill the purposes of Title VI and its implementing regulations.

Agencies must address many goals with limited resources and are likely to view enforcing agency-specific, technical regulations as more central to their mission than preventing racial or other discrimination. As a result, as documented by the USCCR, many have underfunded and understaffed their civil rights enforcement programs. *See* USCCR, *Federal Title VI Enforcement, supra,* 14-18. This Court has also recognized that federal agencies, faced with civil rights complaints, may "simply decide not to investigate – a decision that often will be based on a lack of enforcement resources, rather than any conclusion on the merits of the complaint." *Cannon,* 441 U.S. at 707 n.41.

In periodic evaluations of the success of federal enforcement of Title VI and its implementing regulations, the USCCR has consistently found that the agencies

reviewed had not provided sufficient resources to the effort, coordinated their actions across agencies effectively or developed adequate enforcement procedures. USCCR, *The Federal Enforcement Effort* (1970); USCCR, *The Federal Enforcement Effort – Seven Months Later* 55-56 (May 1971); USCCR, *The Federal Enforcement Effort – One Year Later* (Nov. 1971); USCCR, *Federal Title VI Enforcement, supra,* at 17. Evaluations by both the General Accounting Office and the Coordination and Review Section of DOJ's Office of Civil Rights confirmed that federal agencies, on the whole, were not living up to their Title VI enforcement responsibilities. USCCR, *Federal Title VI Enforcement, supra,* at 16-17 (citing U.S. General Accounting Office, *Agencies When Providing Federal Financial Assistance Should Ensure Compliance with Title VI,* Rept. No. 112,063 (Apr. 15, 1980); DOJ, Civil Rights Division, "Title VI – Fifteen Years Later," *Title VI Forum,* vol. 4, no. 2 (Fall 1979)).

Many federal agencies have developed a backlog of Title VI complaints. USCCR, *Federal Title VI Enforcement, supra,* at 646-58. For example, in 1998, the DOEd had a backlog of 747 civil rights complaints, 139 of which were likely to have been filed under Title VI. DOEd, Office of Civil Rights, *Annual Report to Congress: Guaranteeing Equal Access to High-Standards Education,* pp. 17-18 (1998) (1998 *Annual Report*). Despite this backlog, the USCCR lauded the DOEd for doing the *best* job of any federal agency to enforce Title VI. USCCR, *Federal Title VI Enforcement,* pp. 646-58.

The Department of Health and Human Services (HHS) also has a backlog of cases, although the number of complaints filed has decreased in recent years. USCCR,

The Health Care Challenge: Acknowledging Disparity, Confronting Discrimination and Ensuring Equality, Vol. II: The Role of Federal Civil Rights Enforcement 172 (1999) (*Health Care Challenge, Vol. II*). By fiscal year 1998, one-third of the 134 complaints being actively investigated by HHS had been carried over from a previous year. *Id.* at 181. The agency was only able to close 71 of those cases during 1998, leaving 63 cases to be carried over to 1999. *Id.*

HHS' ability to enforce Title VI has always been limited. *See, e.g.*, David Barton Smith, *Health Care Divided: Race and Healing a Nation* 317-20 (Ann Arbor: Univ. of Mich. Press 1999); Michael Meltsner, *Equality and Health*, 115 Penn. L. Rev. 22 (1966). An independent review conducted in the 1960s found that "[e]ven when persistent violations have been discovered . . . , sanctions have not been imposed, and so violations of constitutional rights often continue unabated." Meltsner, *supra*, at 25-26. For example, although Medicare required Title VI certification of hospitals as a condition of participation, nursing homes and other forms of health care were not subject to field audits and remained substantially segregated. Barton Smith, *supra*, at 226, 318-19. During the 1970s, civil rights enforcement at the Department of Health, Education and Welfare (HEW) fell prey to the concern that compliance activities would impede federal health planning, a competing priority for the agency. David Barton Smith, "Addressing Racial Inequalities in Health Care: Civil Rights Monitoring and Report Cards," 23 *Health Politics, Policy and Law* 75, 87 (1998).

A 1987 report by the House Committee on Government Operations found that HHS, which was then

providing in excess of $330 billion annually to nearly 230,000 health and social service agencies subject to Title VI, unnecessarily delayed Title VI case processing, allowing discrimination to continue; routinely conducted superficial and inadequate investigations; and failed to bring formal administrative or judicial enforcement in cases in which it had been unable to negotiate voluntary compliance. H. Comm. On Gov't Operations, *Investigation of the Office for Civil Rights in the Department of Health and Human Services* 3, 5, 16, 20 (April 15, 1987). Only last year, the USCCR found that HHS' complaint investigations continue to be "replete with problems," including insufficient staff training on investigative procedures, and the backlog has "resulted in considerable pressure to close cases, increasing the likelihood of cases being closed prematurely." *Health Care Challenge, Vol. II* at 172. Clearly, HHS does not have the resources or ability to enforce Title VI and its regulations fully on its own.

The EPA's enforcement record is similarly poor. Between December 1992[3] and October 2000, the EPA agreed to investigate 61 Title VI administrative complaints. Status Summary Table of EPA Title VI Administrative Complaints (10/04/00) ("Status Summary Table") located at *http://www.epa.gov/ocrpage1/docs/t6stoc2000.pdf.*

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[3] The first Title VI disparate impact complaint was filed with the EPA in December 1992, but, because the EPA had no procedures for handling such complaints, it was filed, and then misplaced until the GLC filed a second complaint about the same facility on behalf of FGUA on July 6, 1994. The EPA accepted the complaint for investigation in January 1995 and, almost six years later, is still analyzing the claim with no decision in sight.

As of October 4, 2000, 57 of those complaints were still pending. *Id.* Eleven had been pending for more than five years. *See* Title VI Complaints Filed With EPA (10/04/00) ("Complaints Filed"), located at *http://www.epa.gov/ocrpage1/docs/t6soct2000.pdf.* In fact, during its entire eight-year history of Title VI complaint investigation, the EPA has decided only *one* case on the merits. Complaints Filed, p. 10.

The failure to resolve these administrative complaints harms individual complainants in concrete ways. The USCCR recently found that "there remain[s] tremendous racial and gender disparities in access to quality health care services," many of which are the result of HHS' failure "to enforce the crucial nondiscrimination provisions of the Federal civil rights laws with which it is entrusted." *Health Care Challenge, Vol. II, supra,* at 274.[4]

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[4] Egregious examples can be found in the administrative dockets of other federal agencies as well. For instance, six years ago, the EPA agreed to investigate *amicus* FGUA's Title VI complaint, mentioned in fn. 2, *supra,* regarding the issuance of a permit to a wood waste incinerator located in a predominantly African-American community. Because the facility would burn construction and demolition debris, much of which could contain lead paint, it threatened to emit lead at a level harmful to a community already overburdened with environmental hazards and, as in many African-American communities, housing a disproportionately high percentage of children with elevated blood lead levels. FGUA asserted that the cumulative impact of these emissions and the other environmental hazards on this vulnerable population resulted in an adverse disparate impact in its community, in violation of EPA's Title VI regulations. The State agency refused to consider any of these issues in its permitting decision, relying entirely on compliance with generic federal and state emission limits. While this facility

The delay itself compromises the ability of these complainants to enforce their rights in other fora as the passage of time means that witnesses become unavailable, agency personnel changes and institutional memory fades.

Given limited staff and funding and multiple goals, federal agencies will always be forced to circumscribe and prioritize their enforcement efforts under their Title VI regulations. If individuals are limited to the administrative process to enforce their civil rights, many will continue to suffer discrimination in federally-funded programs, contrary to the direct mandate of Title VI.

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emits lead at potentially harmful levels, the EPA continues to "study" the matter.

Similarly, *amicus* RSC was faced with a government agency that had permitted all three of California's toxic waste dumps to be located in farmworker communities that ranged from 65% to 95% people of color, and which permitted a toxic waste treatment facility one block from the Sanborn Court housing complex, in an 84% Latino neighborhood. In response, RSC filed a Title VI complaint with the EPA in August 1995, alleging disparate impact and disparate treatment by California's Department of Toxic Substances Control. RSC's worst fears about the nearby toxic waste facility were realized when the facility dumped toxic chemicals down the drain, and when repeated accidents at the facility sent one worker to the hospital, sent clouds of toxic ammonia into the surrounding neighborhood, and forced local regulatory agencies to shut the plant down. While this facility has closed, RSC's concerns about the permitting process itself remain unaddressed. Over five years after RSC's complaint was filed, the EPA has still not made the basic determination of whether to even *accept* the complaint for investigation, despite the requirement within its regulations that such a determination be made within 20 days, 40 C.F.R. § 7.120(d)(1)(i).

Certainly, it was not the intent of Congress to leave an aggrieved individual's ability to seek redress subject to the resources and priorities of an overburdened federal agency.

2. The process for administrative enforcement of Title VI regulations does not allow full or effective participation by individual complainants.

Our judicial system is premised on the notion that directly affected individuals have the strongest incentive to pursue their claims vigorously and participate in litigation in a way that ensures full and fair resolution of complaints. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). Accordingly, even with a statutorily-provided administrative process, a private right of action may be necessary where the administrative process "does not assure [the specially benefitted class] the ability to activate and participate in the administrative process contemplated by the statute." *Cannon*, 441 U.S. at 706, n.41.

As reflected in the *amicus* brief filed below by the United States, federal agencies have long assumed that individuals can enforce their rights under the Title VI regulations in federal court. Brief for the United States as Intervenor and as *Amicus Curiae*, at Section II.B. Accordingly, most agencies have designed their Title VI enforcement procedures to simplify the investigation for the funding agency rather than to provide a forum for individual complainants to be heard. The resulting administrative enforcement process thus often marginalizes the

affected individuals, even though individual complainants have the greatest motivation to investigate thoroughly and persuasively present evidence demonstrating civil rights violations affecting them.

Generally, a complainant files an initial complaint, describing the alleged Title VI violation, but is not made a party to the proceeding. *See, e.g.*, 28 C.F.R. §§ 42.107(b)-(d), 42.110(b) (DOJ); 29 C.F.R. §§ 31.7(b)-(d) (Labor); 32 C.F.R. §§ 195.8(b)-(d) (Defense); 49 C.F.R. §§ 21.11(b)-(d) (DOT); 34 C.F.R. §§ 100.7(b)-(d) (DOEd); 45 C.F.R. §§ 80.7(b)-(d) (HHS); 40 C.F.R. § 7.120 (EPA). For example, under the EPA's policies, the agency itself has the only formal role in rebutting justification or mitigation defenses, EPA Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits, 65 Fed. Reg. 39650, 39683 (2000) (EPA Draft Guidance), even though the complainant has the greatest incentive and probably the best information to do so. Many agencies do not give complainants the right to participate in settlement negotiations, *see, e.g.*, DOEd, 1998 *Annual Report*, p. 8; EPA Draft Guidance, 65 Fed Reg. at 39673-674, although the agency may be most interested in compliance plans that prevent future discrimination rather than redressing the individual harm that generated the complaint. Moreover, the complainant has no administrative appeal if his or her claim is denied. *See, e.g.*, 28 C.F.R. §§ 42.108(c), 42.110(g)(2) (DOJ); 29 C.F.R. §§ 31.8(b), 31.10 (Labor); 32 C.F.R. §§ 195.9(c), 195.11 (Defense); 49 C.F.R. §§ 21.13(c), 21.17 (DOT); 34 C.F.R. §§ 100.8(c), 100.10 (DOEd); 45 C.F.R. §§ 80.8(c), 80.10 (HHS); 40 C.F.R. § 7.130(b) (EPA). *See also* DOEd, Office of Civil Rights,

Case Resolution Manual 12 (Feb. 1998); EPA Draft Guidance, 65 Fed. Reg. at 39683-684.

Congress has recognized the inherent problems in relying exclusively on administrative enforcement under Title VI. In 1976, Congress passed the Civil Rights Attorney's Fees Award Act, P.L. 94-559, 90 Stat. 2641 (1976) which allows individual Title VI litigants to be awarded attorney's fees under 42 U.S.C. § 1988. In so doing, Congress acknowledged individual lawsuits under the civil rights laws, including Title VI, as an integral part of its enforcement strategy and that such actions should be encouraged. Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. 4-5, *reprinted in* 1976 USSCAN 5908, 5912, citing *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Richardson v. Hotel Corporation of America*, 332 F. Supp. 519 (E.D. La. 1971), aff'd, 468 F.2d 591 (5th Cir. 1972); *United States Steel Corp. v. United States*, 385 F. Supp. 346 (W.D. Pa. 1974).

B. Allowing a Private Right of Action Is Consistent with the Goals and Structure of Title VI.

Although Congress intended Title VI to prevent future discrimination and provide a remedy for present discrimination, it preferred to accomplish this goal without punishing recipients of federal funds through withdrawal of their funding. 110 Cong. Rec. 1520 (Rep. Cellar), 1538 (Rep. Rodino), 13333 (Sen. Ribicoff); *see also Cannon*, 441 U.S. at 704. Because individual litigants are primarily "interested in obtaining a benefit for [themselves]," *Cannon*, 441 U.S. at 705, they are likely to request

personal, narrowly tailored relief that falls within Congress' intended result. Moreover, under existing case law, individuals acting as private attorneys general under the Title VI regulations are limited to prospective equitable remedies. *See, e.g., Guardians*, 592 U.S. at 601; *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 285-87 (1998). As the court below properly opined, the distinction between equitable and monetary relief is significant, especially as it applies to the enforcement of disparate impact regulations. *Sandoval v. Hagan*, 197 F.3d 484, 500, n.14 (11th Cir. 1999). Thus, individuals filing a private enforcement action under Title VI regulations are only able to invoke a limited subset of the remedies available to the funding agency, and thus to which federally-funded entities are already subject, and could not impose potentially punitive damages remedies.

Petitioner argues that private actions are inappropriate because they would circumvent the notice and settlement negotiation requirements imposed on funding agencies. Brief for Petitioners at 27-28. However, there is a significant difference between a lawsuit filed by an individual to compel compliance with Title VI and a Title VI investigation by a federal agency. If, upon investigation, a federal agency finds a Title VI violation, the agency has the discretion to choose the drastic remedy of administratively withdrawing federal funds, rather than asking the DOJ to file a federal lawsuit to compel compliance, with its attendant protections for the funded entity. Because a recipient of federal funds risks losing federal funds as soon as an investigation is begun, the pre-investigation notice and negotiation requirements imposed by Congress are necessary. With an individual

lawsuit, however, a recipient has by definition significant procedural protections, including notice of the nature of the claim and time to settle before any adverse action is taken, and is never at risk of losing its funding. Thus, the notice and settlement requirements are not aimed at private litigants and, in practical terms, an individual lawsuit provides comparable protections.

III. ALLOWING A PRIVATE RIGHT OF ACTION DOES NOT CREATE LEGAL UNCERTAINTY, IMPOSE ADDITIONAL BURDENS ON RECIPIENTS OF FEDERAL FUNDS OR OPEN THE "FLOODGATES OF LITIGATION."

The various *amici* supporting Petitioner argue that providing for a private right of action under the Title VI regulations would disrupt the settled state of the law, impose unreasonable burdens on recipients of federal funds and open the "floodgates of litigation" under these regulations. *See, e.g.*, WLF Brief at 23-25; Brief of *Amicus Curiae* National Association of Manufacturers (NAM Brief). These arguments miss the point and mischaracterize the state of the law. Title VI and its disparate impact regulations have been the law for three decades and suits have been filed under these regulations for more than 25 years. *See, e.g., Larry P. v. Riles*, 793 F.2d 969, 981-82 (9th Cir. 1984). Allowing this long-standing practice to continue will not "disrupt the settled state of the law," as it *is* the settled state of the law; nor will it create overwhelming amounts of private litigation.

A. Allowing a Private Right of Action Under Title VI Regulations Will Not Overly Burden the Courts.

Petitioners and their supporting *amici* devote significant time and effort raising the specter of unlimited and unmanageable litigation under a private right of action to enforce Title VI regulations. However, they provide no evidence to support this claim. It is noteworthy that the same claim was raised in an effort to prevent passage of the Civil Rights Act of 1964, and to prevent private rights of action under Title VI itself and under Title IX. *See Cannon*, 441 U.S. at 709. Such doomsday predictions have yet to be realized. On the contrary, the available evidence suggests that the number of private actions likely to be filed under Title VI's regulations is easily manageable by the courts.

Almost from the moment that Title VI and its implementing regulations were created, individuals have sought to enforce these provisions through private lawsuits. Nine federal circuit courts have assumed the existence of an implied private right of action under the Title VI regulations. *See, e.g., Latinos Unidos de Chelsea v. Secretary of Hous. & Dev.*, 799 F. 2d 774, 785 n.20 (1st Cir. 1986); *New York Urban League, Inc. v. New York*, 71 F.3d 1031, 1036 (2nd Cir. 1995); *Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999); *Castaneda by Castaneda v. Pickard*, 781 F.2d 456, 465 n.11 (5th Cir. 1986); *Buchanan v. City of Bolivar, Tenn.*, 99 F.3d 1352, 1356 n.5 (6th Cir. 1996); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Larry P.*, 793 F.2d at 981-82 (9th Cir.); *Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *Sandoval*, 197 F.3d 484 (11th Cir.). Despite this broad and long-standing recognition by almost every federal

appeals court of the right to sue under the disparate impact regulations, there has been no flood of lawsuits.

Many of the *amici* point to environmental justice claims as being one of the fastest growing types of disparate impact claims and potentially causing the greatest disruption in the judicial system. *See, e.g.*, NAM Brief at 15-19; WLF Brief at 24. The reality is otherwise. The EPA reports that during the last five years, local, state and federal agencies have granted more than 250,000 permits in the environmental context. During that time, there have been only *two* reported cases alleging violations of Title VI disparate impact regulations in permitting decisions. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated as moot*, 525 U.S. 974 (1998); *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996). Even if administrative complaints are considered, there is no reason for alarm. In the past eight years, the EPA has received 103 complaints, or roughly 13 annually. Status Summary Table.

In addition, the ease of filing an administrative claim compared to the difficulty of filing a lawsuit strongly suggests that fewer lawsuits than administrative claims will be filed. For example, to file a complaint with DOEd, an individual must simply send a letter including his name and address, a description of the person or class of person being discriminated against, the name and location of the agency that discriminated and a description of the discriminatory act. DOEd, Office of Civil Rights, *How to File a Discrimination Claim with the Office of Civil Rights*, located at *http://www.ed.gov/offices/OCR/howto.html* (Nov. 14, 2000). In comparison, to file a lawsuit, a complainant must conduct his own investigation, produce sufficient

evidence to prove his claim, obtain representation or represent himself, pay a filing fee and other significant costs, file formal pleadings, meet standing requirements and engage in extensive discovery. These additional burdens have already and continue to convince a substantial number of potential litigants to rely on the administrative process, whatever its limitations.

In fact, some of the administrative complaints that have actually been filed could support a private intentional discrimination lawsuit directly under the statute. For example, DOEd received complaints about a school district that segregated Latino students from the rest of the student population during both academic and non-academic classes without consideration of the Latino students' proficiency in English, as well as another school system that used different placement criteria for white and black students who had received similar scores on a test for learning disorders. DOEd, 1998 *Annual Report* at 26-27. Either of these complaints could have supported an intentional discrimination claim in federal court, yet the complainants in each case chose to use the administrative process instead. Given the burdens of litigation and the relative ease of filing administrative complaints, many individuals will continue to select the administrative process over litigation.

B. Allowing A Private Right of Action Under Title VI Regulations Does Not Impose New or Unworkable Burdens on Recipients of Federal Funds.

Title VI regulations are presently binding on all recipients of federal funds. As Justice Marshall noted in his dissent in *Guardians*, every applicant for federal funds is clearly notified that it must comply with Title VI and its implementing regulations and, in fact, signs a contract in which it agrees to do so. 463 U.S. at 629-30. Despite this fact, *amicus* NAM argues that allowing individuals to enforce Title VI regulations in the issuance of Clean Air Act permits would disrupt a settled area of law and impose additional obligations on state environmental protection agencies and on regulated industries. NAM Brief at 7-9. NAM ignores the fact that Title VI has, for 30 years, imposed a non-discrimination obligation on recipients of federal funds that is independent of other legal duties. Compliance with the Clean Air Act does not exempt recipients of federal funds from their obligations under Title VI. While a credible threat of enforcement may compel state agencies to develop procedures for ensuring compliance with the applicable Title VI regulations, it does not change or expand their existing legal duties. State environmental agencies can easily avoid disruption to their permitting process by including Title VI considerations in initial permitting decisions, as required, and taking active measures to address the health and environmental harms currently afflicting communities of color within their jurisdiction. *See* Draft Title VI Guidance

for EPA Assistance Recipients Administering Environmental Permitting Programs, 65 Fed Reg. 39650 (2000).

NAM also characterizes claims under the Title VI regulations in the environmental context as a "collateral attack on permits." NAM Brief at 19. Again, NAM fails to recognize that state environmental agencies that receive federal funds are presently required to comply with these regulations in issuing permits. A lawsuit challenging an agency's failure to comply with its existing legal obligations in issuing a permit is not a "collateral attack" on the permit.

Moreover, contrary to the assertions of Petitioner and their supporting *amici*, the judicial resolution of claims filed under Title VI regulations would not impose standardless and unknown burdens on recipients of federal funds. It is already well-established that disparate impacts are not *per se* a violation of Title VI. Rather, only "actions having an *unjustifiable* disparate impact on minorities" constitute a violation of Title VI disparate impact regulations. *Alexander*, 469 U.S. at 293 (emphasis added). *See also* Title VII, Civil Rights Act (CRA) of 1964 as amended by CRA of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), codified at 42 U.S.C. §§ 2000e, *et seq.*

Courts analyzing claims under the Title VI regulations have historically borrowed from the burden shifting scheme for disparate impact claims under Title VII. 42 U.S.C. § 2000e-2(k)(1)). *See, e.g., Sandoval*, 197 F.3d at 507; *Elston v. Talladega County Bd. of Ed.*, 997 F.2d 1394, 1407 & n.14 (11th Cir. 1993); *United States v. LULAC*, 793 F.2d 636, 648 & n.35 (5th Cir. 1986); *City of Chicago v. Lindley*, 66 F.3d 819, 828-29 & n.12 (7th Cir. 1995); *Larry P.*, 793 F.2d at

982 & n.9; *cf. Bd. of Ed. v. Harris*, 444 U.S. 130, 151 (1979) (borrowing from Title VII burden scheme to formulate defendant's burden in disparate impact case under Emergency School Aid Act). Under this analysis, if the plaintiff can make a *prima facie* showing that a particular policy or practice causes a disparate impact, the defendant must rebut by demonstrating that the challenged practice is "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In the context of the Title VI regulations, courts have required that the policy or practice have a "substantial legitimate justification," which has been further defined as having a "manifest relationship" to, or being "necessary to meeting a goal that was legitimate, important, and integral" to, the recipient's "institutional mission." *See, e.g., Elston*, 997 F.2d at 1412-13; *New York Urban League, Inc.*, 71 F.3d at 1036; *Ferguson v. City of Charleston*, 186 F.3d 469, 480 (4th Cir. 1999); *Larry P.*, 793 F.2d at 982 & n.9 (requiring "educational necessity" in special education case under Title VI regulations); *cf. Harris*, 444 U.S. at 151 (suggesting "educational necessity" standard in Emergency School Aid Act case); *LULAC*, 793 F.2d at 648-49 (requiring "bona fide educational requirement" in educational testing case under Title VI regulations). If the defendant meets this standard, the burden then shifts back to the plaintiff to show that there is a "less discriminatory alternative" that would serve the defendant's mission. 42 U.S.C. §§ 2000e-2(k)(1)(A)(ii), (k)(1)(C). *See, e.g., Sandoval*, 197 F.3d at 507; *New York Urban League, Inc.*, 71 F.3d at 1036; *Elston*, 997 F.2d at 1407. Thus, the Title VI regulations do not direct recipients to eschew any policy choice which will result in a disparate impact but only to

avoid causing a disparate impact without a substantial reason or when their goals could be reached through less discriminatory means.

Given this developed system of evaluating Title VI disparate impact claims, recipients of federal funds are well positioned to defend themselves against individual lawsuits. The threat of private lawsuits, while more likely to provide incentive for compliance than administrative enforcement alone, will not subject recipients to unlimited liability for their justifiable administrative decisions. Requiring recipients of federal funds to consider and attempt to address the racial disparities created by their policies and actions is neither unreasonable nor undesirable.

CONCLUSION

Both the history and purpose of Title VI support an implied private right of action to enforce the disparate impact regulations that Congress required federal agencies to issue. Because administrative enforcement efforts alone have proven incapable of effectively protecting individuals from prohibited discrimination in federally-funded programs, private enforcement of Title VI regulations is necessary to meet the statutory goal of providing individuals effective protection from discrimination in federally-funded programs. Individuals have used the courts to enforce Title VI and its regulations for more than 25 years. This experience has shown that individual enforcement of Title VI and its regulations, while crucial to meeting the goals of the statute, has not and will not

overwhelm the courts or subject recipients to unlimited liability.

Respectfully submitted,

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